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Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-900

MAJOR EDWARD PAYNE,

Petitioner,

VS.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

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No. _____

MAJOR EDWARD PAYNE,

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STATE OF OHIO,

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PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

Major Edward Payne, petitioner, prays that a writ of certiorari issue to review the final judgment and decree of the Ohio Supreme Court dismissing petitioner's appeal as of right and overruling petitioner's motion for leave to appeal from the decision of the Court of Appeals, Eighth Appellate District, Cuyahoga County, Ohio, affirming the petitioner's convictions of Theft in Office, under Ohio Revised Code Section 2921.41, and Intimidation, under Ohio Revised Code Section 2921.03. The final judgment and decree of the Ohio Supreme Court was originally entered on July 6, 1978. Petitioner's motion for rehearing was denied on September 7, 1978 by the Ohio Supreme Court.

OPINIONS BELOW

The Ohio Supreme Court rendered its orders without opinion. Its orders in this case are set forth in the separately bound appendix to this petition, at 1 - 3. The opinion of the Court of Appeals, Eighth Appellate District, Cuyahoga County, Ohio, which is unreported, is set forth in the Appendix at 5 - 83. No opinion was delivered in the Court of Common Pleas, Cuyahoga County, Ohio, the trial court in this case.

JURISDICTION

The orders of the Ohio Supreme Court dismissing petitioner's appeal as of right and overruling his motion for leave to appeal were issued on July 6, 1978. On September 7, 1978, the Ohio Supreme Court entered its order denying the petitioner's motion for rehearing.

This petition seeks review of a final judgment and decree rendered by the highest court of the State of Ohio in which a decision could be had, in a case in which titles, rights, privileges and immunities are specially set up and claimed by the petitioner under the Constitution of the United States. This Court has jurisdiction to review the judgment and decree of the Ohio Supreme Court in this case under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

I.

Where, in a state criminal prosecution resulting in the petitioner's conviction, there was no evidence to support one of the elements of the crime as charged in the indictment and the bill of particulars,

where the State assumed the burden of proving that element and promised the jury that it would prove that element beyond a reasonable doubt, and where the trial court instructed the jury, without objection by the State, that such element was one of the essential elements of the offense charged, was the petitioner denied his Sixth and Fourteenth Amendment rights to be informed of the charge against him and to due process when a state appellate court affirmed the petitioner's conviction upon a determination that it had been unnecessary for the State to allege and attempt to prove such element?

II.

Where, in a state criminal prosecution, two of the three judges sitting on the state appellate court to which the petitioner had appealed his conviction determined that the trial court had erroneously admitted certain hearsay testimony, where that testimony had constituted the most crucial evidence to support a fact which was central to the State's entire theory of the case, and where the petitioner had built his central defense around his contention that such fact did not exist, was the petitioner denied his Sixth and Fourteenth Amendment rights to be informed of the charge against him and to due process when the judge who cast the deciding vote in the state appellate court determined that the error had been harmless, because the State had not been required to prove the disputed fact, as a result of which determination the petitioner's conviction was affirmed on the basis of an entirely different theory of the case from that which the State had advanced in the trial court to secure the conviction?

III.

Where, in a state criminal prosecution brought against the petitioner, testimony concerning the contents of a written statement made by an unidentified and absent declarant was admitted on a crucial point, for the purpose of proving the truth of the matter asserted in the written statement, was the petitioner deprived of his Sixth and Fourteenth Amendment right to confront the witnesses against him?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 6:

> "In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him...."

United States Constitution, Amendment 14:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law...."

Ohio Revised Code, §2921.03:

> "Intimidation.
>
> (A) No person, knowingly and by force or by unlawful threat of harm, shall attempt to influence, intimidate or hinder a public servant, party official, or witness in the discharge of his duty.
>
> (B) Whoever violates this section is guilty of intimidation, a felony of the third degree."

Ohio Revised Code, §2921.41:

> "Theft in Office.
>
> (A) No public official or party official shall commit any theft offense, when either of the following applies:
>
> (1) The offender uses his office, or permits, or assents to its use, in aid of committing the offense;
>
> (2) The property or service involved is owned by this or any other state or the United States, a municipality, or any political subdivision, department, or agency of any of them, or by a political party, or is part of a political campaign fund.
>
> (B) Whoever violates this section is guilty of theft in office, a felony of the third degree.
>
> (C) A public servant or party official who is convicted of theft in office is forever disqualified from holding any public office, employment, or position of trust in this state."

STATEMENT OF THE CASE

A. Procedural History

On November 17, 1975, Major Edward Payne, the petitioner, was indicted by the grand jury of Cuyahoga County, Ohio, on two counts of Theft in Office, under Ohio Rev. Code §2921.41, and two counts of Intimidation, under Ohio Rev. Code §2921.03. A jury trial held in the Court of Common Pleas of Cuyahoga County, Ohio, in February, 1976, resulted in petitioner's conviction on one count of Theft in Office, which count had charged him with having "...obtained for his own use two 9-millimeter firearms, with pearl handles, from property lawfully seized by and in the possession of the Cuyahoga County Sheriff's Department," and on one count of Intimidation, which count had charged the petitioner with intimidation of Donald Campbell, a public servant, in the discharge of his duty. Judgment of acquittal was entered by the trial court on the other charge of Intimidation, and the jury acquitted the petitioner on the other charge of Theft in Office. The trial court imposed prison sentences of two to ten years and three to ten years upon the petitioner for his convictions, the sentences to run concurrently.

On appeal, the petitioner's convictions were affirmed by a divided Court of Appeals for the Eighth Appellate District, Cuyahoga County, Ohio. The petitioner's subsequent application for reconsideration was denied by that court on March 21, 1978. Thereafter,

on July 6, 1978, the petitioner's appeal as of right to the Ohio Supreme Court was dismissed on the ground that no substantial constitutional question was presented. At the same time, that court overruled the petitioner's motion for leave to appeal. Major Payne's petition for rehearing was denied by the Ohio Supreme Court on September 7, 1978.

B. Facts

1. The Theft in Office Conviction

The petitioner was convicted of Theft in Office upon a charge that he had converted to his own use "...two 9-millimeter firearms, with pearl handles, from property lawfully seized by and in the possession of the Cuyahoga County Sheriff's Department." The evidence at trial revealed that the petitioner, who in 1975 was a Major in the Cuyahoga County Sheriff's Department and the warden of the Cuyahoga County jail, was selected by the Sheriff to head a new division in the Sheriff's Department known as Division 4 (Transcript, p 565).[1/] As the head of Division 4, Major Payne commandeered a considerable number of raids on after-hours places and cheat-spots in Cuyahoga County (Tr. 577), including one on April 19, 1975, at 10001 Cedar Avenue in Cleveland, Ohio (Tr. 505). What occurred immediately after that raid was a matter of great dispute in the trial court, a

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1/ References to the reporter's transcript of proceedings in the trial court will hereinafter be designated by the abbreviation "Tr."

dispute which went to the very heart of this case.

The principal witness for the State was Donald W. Campbell,[2] who had been employed by the Sheriff's Department as a Deputy Trainee in January, 1975 (Tr. 22). At the end of February or beginning of March of that year, he began working in Division 4, where his superior officer was Major Payne, the petitioner (Tr. 23). He testified that in the early morning hours of April 19, 1975, Major Payne planned and executed a raid at 10001 Cedar Avenue (Tr. 25). Campbell himself did not participate in that raid, but remained at Division 4 (Tr. 25), which was located on the fourth floor of the County Jail (Tr. 511).

When the raiders returned that morning, Campbell observed deputies carry into Division 4 evidence that had been seized at the raid (Tr. 27). He also observed several weapons in Division 4 that morning, including two 9-millimeter pearl-handled firearms which were in plastic bags (Tr. 28-30). Campbell did not specifically say, however, nor did the prosecution ask him, whether or not those two 9-millimeters had been part of the evidence he had observed the deputies carry into Division 4, upon their return from the Cedar raid.

Campbell testified that those two pearl-handled firearms were taken out of

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[2] The prosecution called a total of five witnesses. With respect to the Theft in Office charges, however, for all practical purposes, Campbell was the State's only witness.

the plastic bags and placed in a brown paper bag by Detective Hosea Garner (Tr. 30). Shortly thereafter, Major Payne, who had requested those firearms from Detective Garner (Tr. 32), transported the firearms out of the fourth-floor office of Division 4 (Tr. 31).

Campbell was the only witness who testified that the petitioner carried two pearl-handled guns out of the fourth-floor office of Division 4 on the morning of April 19, 1975. By way of contrast, numerous witnesses who participated in the Cedar raid and who were present at Division 4 following the raid, testified that neither Major Payne nor Donald Campbell was even in Division 4 on April 19 following the raid. (Deputy Thornton, Tr. 626; Deputy Burress, Tr. 661, 683; Deputy Bly, Tr. 760, 761; Detective Garner, Tr. 1114, 1115; Marion Koszewski, Tr. 981). Detective Garner took the stand and flatly denied that he gave Major Payne any firearms on April 19 (Tr. 1115).

For several reasons, it was essential to the State's case to prove that the two pearl-handled firearms, allegedly carried out of the fourth-floor office of Division 4 by Major Payne, had been seized, earlier, by the Sheriff's Department at the Cedar Avenue raid.

First, proof linking the pearl-handled guns to the Cedar raid was an essential link in the chain of circumstantial evidence upon which the State relied to prove that when Major Payne carried those guns out of the fourth-floor office of Division 4, he intended to convert them to his own use. Inasmuch as the petitioner was the head of Division

4, the warden of the County Jail, and a Major in the Sheriff's Department, it obviously was no crime for him to handle evidence in the Sheriff's custody, or to transport evidence in the Sheriff's custody from one room to another in the County Jail Building, or to perform any number of perfectly legitimate functions in the course of his official duties which would require him personally to carry evidence in the Sheriff's custody from one location to another. Since there was no evidence at all to demonstrate what the petitioner did with the pearl-handled guns or where he transported them after carrying them out of the fourth-floor office of Division 4, the State relied upon other evidence in its attempt to prove that Major Payne carried those guns out of the Division 4 office, not in connection with any legitimate official purpose he might have had as the head of Division 4, but for the purpose of converting those firearms to his own personal use. That other evidence, however, was entirely based on the premise that the pearl-handled guns had been seized by the Sheriff's Department at the Cedar raid.

Donald Campbell testified that the customary practice of Division 4 members following a raid was to enter, in the Sheriff's property book, under a heading which includes the address of the place raided and the date of the raid, a complete list of each item seized on the raid (Tr. 56-59). He also testified that it was standard procedure for Division 4 members to include a complete list of all items seized on a raid in the inventory returned with the search warrant that authorized the raid (Tr. 34-38). An

examination of the Sheriff's property book revealed that the two pearl-handled guns were not included in the list of items seized at the April 19th Cedar Avenue raid, however (Tr. 56-59). Similarly, the two pearl-handled guns were not included in the list of items entered in the inventory returned with the search warrant which authorized the April 19th Cedar raid (Tr. 34-38). Assuming that the pearl-handled guns had, in fact, been seized at the Cedar raid, the evidence showed that Major Payne carried them out of the fourth-floor office of Division 4 before the fact of their seizure at the Cedar raid was recorded in writing either in the Sheriff's property book or in the inventory returned with the search warrant, a fact which, under the State's view, was inconsistent with his carrying those guns out of the Division 4 office for some legitimate function in connection with his official duties as the head of Division 4. Rather, under the State's view, such evidence demonstrated that Major Payne attempted to conceal the existence of those pearl-handled firearms, a fact consistent with the State's contention that he intended to convert those guns to his own use.

It was also essential for the State to prove that the pearl-handled guns had been seized at the Cedar raid in order to demonstrate that the guns carried out of the Division 4 office actually belonged to the Sheriff's Department, thereby ruling out the possibility that the guns belonged to the petitioner.

Finally, it was essential for the State to link the pearl-handled guns to the Cedar raid in order for it to fulfill

the promises it had made to the jury in opening statement and to prove its entire theory of the case, which had been consistently that Major Payne took for his own use two pearl-handled guns that had been lawfully seized by the Sheriff's Department during the course of a raid on April 19, 1975, at 10001 Cedar Avenue.

The State introduced three pieces of circumstantial evidence in its attempt to prove that the pearl-handled firearms had been seized at the Cedar raid. One such piece of evidence was the testimony of James Marino, a news reporter, who had been present at the Cedar raid (Tr. 505). He testified that Major Payne told him that six handguns and one shotgun had been seized at Cedar (Tr. 506). The Sheriff's property book had entries for only four pistols and a shotgun under the April 19th Cedar raid listing (Tr. 59). Another piece of circumstantial evidence linking the pearl-handled guns to the Cedar raid was provided by the testimony of Sims Goodman, Jr.[3] He testified that he was in the vicinity when the Cedar raid occurred (Tr. 303-304). After the raid was over, Goodman remained in the area and observed two persons whom he knew come out from the direction of where the raid took place (Tr. 307). They were

[3] Goodman was an informant for the Cleveland Police Department (Tr. 332), which, according to Goodman, was "out to get Major Payne" (Tr. 333), apparently because the petitioner's raids on cheat-spots were interfering with payoffs to Cleveland policemen (Tr. 377). He admitted that the police department enlisted him to secure evidence against petitioner (Tr. 334-335).

"high rollers" (big gamblers) named Ivan Lapsley and Big Jordan (Tr. 307). Goodman stated that on prior occasions he had seen them carrying 9-millimeter automatic pistols with snow white grips (Tr. 309-310). A few days after the raid, Goodman observed them carrying different firearms (Tr. 311).[4] But the most crucial evidence linking the guns to the Cedar raid was the testimony of Donald Campbell, admitted over the petitioner's objection. Campbell testified that there were yellow tags inside the plastic bags which contained the two pearl-handled firearms he had observed in Division 4 (Tr. 29). Over defense objection, Campbell was permitted to testify that written on the tags was an address--10001 Cedar Avenue (Tr. 29).

The evidence tending to prove that no pearl-handled firearms had been seized at the Cedar raid was both direct and substantial. Several witnesses who had been present at the raid testified that they saw no pearl-handled automatic pistols there (Powell Caesar, Tr. 729-730; Deputy Burress, Tr. 689; James Marino, Tr. 514;

[4] On cross-examination by appellant's trial counsel, Goodman also testified that Jordan told him, "that nigger Payne got my gun." (Tr. 371). The significance, if any, of that hearsay testimony is unclear, at best. Jordan was not arrested at Cedar, and would have had no way of knowing that Major Payne took his gun from Division 4. Thus, if Goodman's testimony is credited, it would appear to indicate that Major Payne took Jordan's gun directly from him; and that the firearms Campbell saw the petitioner remove from Division 4 were other firearms.

Detective Garner, Tr. 1114-1115). Furthermore, both Big Jordan and Ivan Lapsley denied ever having owned 9-millimeter firearms with snow white grips (Tr. 855, 882).

Nevertheless, the petitioner was found guilty of the charge that he had converted to his own use two pearl-handled guns that had been lawfully seized by the Sheriff's Department.

2. The Intimidation Conviction

The petitioner was also convicted on a charge that he had intimidated Deputy Trainee Campbell, a public servant, in the discharge of his duty. This conviction was closely connected to the Theft in Office charge. Indeed, the petitioner's conviction of Intimidation was dependent upon his conviction of Theft in Office, because it was the alleged commission of a theft offense by the petitioner which gave him a motive and reason for the alleged intimidation of Campbell.

Campbell testified that on July 3, 1975, while engaged in undercover work, he was attacked by six men in front of a downtown bar, thereby sustaining substantial injuries (Tr. 106-107). Because of those injuries, he was unable to work and was confined to his home throughout the month of July.[5] During that month, Campbell was visited several times by

[5] Campbell never did return to work as a deputy sheriff; the Sheriff placed Campbell on extensive disability after he was injured, and on December 15, 1975, the Sheriff fired him (Tr. 120).

officers of the Sheriff's Department, including Major Kulis, Marion Koszewski, and Captain Brown (Tr. 108-110). Each of these visitors desired to talk about Major Payne's activities, and each also requested that Campbell turn over to him certain notes Campbell had been keeping concerning irregularities in Division 4,[6] including the alleged theft of the two pearl-handled guns by the petitioner, but Campbell refused to satisfy their requests. (Tr. 108, 111-112, 117, 187).[7]

Campbell further testified that on August 1, 1975, Major Payne invited Campbell and his wife to meet him at a cocktail lounge in Cleveland the following night (Tr. 113). The petitioner told Campbell that he had already arranged for Phillip

[6] These notes were never produced at trial. Campbell testified that they were stolen from his home in a burglary in November of 1975 (Tr. 152). Campbell stated that nothing else was stolen in the burglary--just his notes from his attache case (Tr. 152). Judith Campbell, Donald Campbell's wife, also testified that the notes were stolen, but she stated that the burglary occurred in October of 1975 (Tr. 427).

[7] Koszewski and Brown, who testified for the defense, disputed Campbell's testimony. They testified that their visits to Campbell's home were actually for the purpose of interviewing Campbell about his own activities (Tr. 987, 1040).

Vari, Campbell's partner, to be there as well (Tr. 113). The next night, August 2, 1975, the Campbells and Vari drove together to the cocktail lounge, arriving at about 9:00 p.m. (Tr. 114). They met Major Payne in the lounge and sat down with him (Tr. 114). The conversation was pleasant, initially, but later in the evening it began to focus on the visits Campbell had received during the month of July from officers of the Sheriff's Department (Tr. 116). Major Payne asked if Campbell had been cooperating with those members of the Sheriff's Department (Tr. 116). When Campbell answered that he was not cooperating, the petitioner asked Campbell to relinquish "everything he had" to the petitioner, a request with which Campbell refused to comply (Tr. 116). When Campbell persisted in his refusal to relinquish his notes, which allegedly contained information concerning the theft by the petitioner of the pearl-handled guns (Tr. 187, 111, 117), Major Payne allegedly said to Campbell, "If you don't cooperate with me, I'll make sure you never get to court." (Tr. 119). In answer to Campbell's inquiry as to what was meant by that statement, the petitioner allegedly answered, "Don't cooperate with me and you'll find out." (Tr. 119). With that, the Campbells and Vari stood up and departed, at about 12:00 or 12:15 a.m. (Tr. 119).[8]

[8] Both Judith Campbell and Phillip Vari agreed with Campbell's version of this August 2 meeting, when they testified. Defense witness Keldon Casey did not, however. He testified that Major Payne introduced him to the Campbells and Vari that night at the Eastown (Tr. 937, 939), that he sat down with the Campbells and Vari until they left at about 2:00 a.m. (Tr. 939), and that during that time there was no conversation concerning the Sheriff's Department (Tr. 945).

The jury returned a verdict of guilty on the charge that the petitioner on August 2, 1975, intimidated Donald Campbell, a public servant, in the discharge of his duty.

C. The Decisions of the Lower Appellate Courts

On appeal to the Court of Appeals, Eighth Appellate District, Cuyahoga County, Ohio, Major Payne advanced a number of arguments pertinent to the present petition.

First, he argued that the evidence had been insufficient as a matter of law to prove one of the elements of the crime of Theft in Office, as that crime had been charged in the indictment. In particular, the indictment had charged that the petitioner had taken two pearl-handled guns that had been "lawfully seized" by the Sheriff's Department. Similarly, the Bill of Particulars alleged that the guns had been lawfully seized. The prosecutor, in his opening statement, promised the jury that he would prove that the guns had been lawfully seized (Tr. 19-20). The trial court instructed the jury that one of the elements of the crime charged was that the guns had to have been lawfully seized (Tr. 1289). The trial court defined for the jury what constituted a lawful seizure (Tr. 1291). These instructions were given without objection by the State. The petitioner argued in the court of appeals that there had been a failure of proof on that element. But the court of appeals ruled that it had been altogether unnecessary for the State to allege and prove, as one of the elements of the crime, the

lawfulness of the seizure of the pearl-handled guns.[9] Accordingly, that court ruled, it could affirm petitioner's conviction notwithstanding the absence of proof to support what the State, the trial court and the defense understood to be one of the elements of the crime. In his application for reconsideration in the court of appeals, and in his memorandum in support of jurisdiction filed in the Ohio Supreme Court, the petitioner argued that the affirmance of his conviction in this fashion by the court of appeals deprived him of his constitutional rights to be informed of the charges against him and to due process (See App. at 110, 114-119, 85-89). This argument was rejected without opinion by both courts, however.

The petitioner also argued in his initial brief in the court of appeals that the trial court had erred in admitting Campbell's oral testimony that written on the yellow tags which were in the plastic bags containing the pearl-handled guns was the address 10001 Cedar Avenue. The petitioner noted that that oral testimony was the most important piece of evidence linking the pearl-handled guns to the Cedar raid, and was, therefore, central to the State's case. Two of the three court of appeals' judges agreed that the trial court had erred in admitting that hearsay testimony (See Judge Corrigan's concurring opinion at App. 24, and Judge Jackson's dissenting opinion at App. 45-54). However, only the dissenting judge found the error to be prejudicial. The concurring judge found the error to be harmless, a conclusion

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[9] See pp. 15-16 of the separately bound Appendix to this petition for a writ of certiorari.

which was based on two premises. First, the concurring judge determined that the error was not of constitutional dimension and, thus, did not have to be harmless beyond a reasonable doubt (See App. 24). Second, the concurring judge agreed with the judge who wrote the opinion for the court that it was not essential to the State's case that it prove the guns had been seized at the Cedar raid, notwithstanding the fact that the State's entire entory of the case had always been that the petitioner had stolen two pearl-handled guns seized by the Sheriff's Department at 10001 Cedar Avenue on April 19, 1975, and notwithstanding the fact that the petitioner had built his central defense around his contention that no pearl-handled guns had been seized at the Cedar raid (See App. 24, 18, 13). In his application for rehearing in the court of appeals, and in his memorandum in support of jurisdiction in the Ohio Supreme Court, the petitioner argued that, contrary to the conclusion of the concurring judge in the court of appeals, the admission by the trial court of Campbell's hearsay testimony was an error of constitutional dimension in that it deprived the petitioner of his Sixth and Fourteenth Amendment right to confront the witnesses against him (See App. 111-114, 90-98). The petitioner further argued that by affirming his conviction on the premise that the State had not been required to prove that the pearl-handled guns had been seized at the Cedar raid, the court of appeals deprived the petitioner of his Sixth and Fourteenth Amendment rights to be informed of the charge against him and to due process in that the affirmance of petitioner's conviction was based upon an entirely different theory of the case from that which the

State had advanced in the trial court to secure the conviction (See App. 114-119, 99-105). These arguments were also rejected without opinion by both courts, however.

Finally, the petitioner argued in his initial brief in the court of appeals and in his memorandum in support of jurisdiction in the Ohio Supreme Court that any error necessitating a reversal of his Theft in Office conviction also required a reversal of his conviction of Intimidation, because of the close connection between the two charges (See App. 106-109; 11-12). In view of the fact that the court of appeals had found the petitioner's conviction of Theft in Office to be free of error, it rejected this argument, however, as did the Ohio Supreme Court, implicitly, when it refused to hear petitioner's appeal.

REASONS FOR GRANTING THE WRIT

I.

An Important Question, Decided By The Lower Courts In A Way Probably Not In Accord With Applicable Decisions Of This Court, Is Presented Concerning The Constitutional Validity, Under The Sixth And Fourteenth Amendments, Of The Action Of A State Appellate Court In Altering The Charge Originally Brought Against An Accused In The Course Of Affirming His Conviction.

The indictment returned by the grand jury in this case charged the petitioner, in one count, with having "obtained for his own use two 9-millimeter firearms with pearl handles on same, from property lawfully seized by and in possession of the Cuyahoga

County Sheriff's Department...." (Emphasis added). The Bill of Particulars supplied to the petitioner repeated this same language, informing him that the State intended to prove, as an element of the charge, that the pearl-handled firearms had been lawfully seized by the Sheriff's Department. In its opening statement to the jury, the State promised that it would prove beyond a reasonable doubt that the pearl-handled guns had been lawfully seized by the Sheriff's Department (Tr. 19-20). The trial court instructed the jury that one of the five elements of the offense with which the petitioner was charged was that the pearl-handled guns had to have been lawfully seized, and that before the jury could return a guilty verdict, it had to find that each of the five elements had been proven by the State beyond a reasonable doubt (Tr. 1288). The trial court elaborated on this element of the crime charged by defining for the jury what constituted a lawful seizure (Tr. 1291). At no time did the State object to the instructions given to the jury by the trial court. The trial court, without objection by the State, caused verdict forms to be prepared and submitted to the jury in which the verdict form for "guilty" of theft in office included a finding that the guns had been lawfully seized. It was that verdict form which the jury signed, thereby representing to the petitioner that it had found beyond a reasonable doubt that the guns had been lawfully seized (Tr. 1300). In short, the State and the trial court, by repeated affirmative actions, led the petitioner to believe that the lawful seizure of the guns was one of the essential elements of the crime with which he was charged and that, in order to escape conviction, he need only raise a reasonable doubt as to the existence of that element

or, in the event of an adverse result, he need only demonstrate to the court of appeals that the evidence was insufficient to prove that element in order to obtain a reversal of his conviction.

There was a total failure of proof, however, that the two pearl-handled guns had, in fact, been lawfully seized. The State was unable to offer a single shred of evidence concerning who seized those guns, or the manner and circumstances under which those guns had been seized.

To be sure, the State attempted to fulfill its promise to the jury that it would prove the element of lawful seizure. The State introduced a search warrant that had been obtained by Deputy Edward Thornton prior to the April 19th raid at 10001 Cedar Avenue (Tr. 38), but that search warrant did not authorize the seizure of any firearms at 10001 Cedar Avenue (State's Exhibit 1-D). Thus, assuming that the two pearl-handled guns had been seized at the Cedar raid, as the State contended, that seizure was a warrantless seizure, and presumptively unlawful.

This Court has consistently held that warrantless searches and seizures are unlawful, except in a few specifically established and well-delineated situations. Coolidge v. New Hampshire, 403 U.S. 443 454-455 (1971); Katz v. United States, 389 U.S. 347, 356 (1967). Inasmuch as there was a total absence of evidence in the present case concerning the manner or circumstances of the seizure of the two pearl-handled guns, no inferences that the seizure of the guns was authorized by an exception to the warrant requirement were possible.

Nor did the court of appeals, in rejecting petitioner's argument that there had been a failure of proof of the element of lawful seizure, in any way intimate that the State had introduced any evidence to prove that the seizure of the guns had been lawful. Rather, the court of appeals concluded that in order to convict the petitioner of Theft in Office under Ohio Revised Code Section 2921.41, it had been unnecessary for the State to allege and attempt to prove that the guns had been lawfully seized by the Sheriff's Department; consequently, the petitioner's conviction could be upheld without regard to the fact that the State had failed to prove the lawfulness of the seizure (See App. 15-16). But as Judge Jackson of the court of appeals noted in dissent, "...the fact that the State of Ohio could have prosecuted the [petitioner] for a crime against 'mere possession' does not change the fact tha the State did prosecute the [petitioner] for a crime against 'lawful possession'." (Emphasis in original; See App. 34-35).

The Sixth Amendment, made applicable to the states by way of the Fourteenth Amendment, Faretta v. California, 422 U.S. 806 (1975), entitles an accused to fair notice of the specific charge against which he must defend, and entitles him to a charging instrument which is not misleading, but is sufficiently certain, unambiguous and precise to enable him to prepare a meaningful defense and avoid surprise. Russell v. United States, 369 U.S. 749 (1962). In the present case, that fundamental right was denied petitioner when the court of appeals ruled that the State had not been required to prove what the State time and time again represented to the petitioner it would prove.

This Court's decision in Cole v. Arkansas, 333 U.S. 196 (1948), is instructive on this issue. There the petitioners had been convicted under a provision of an Act of the Arkansas legislature which prohibited the promotion or encouragement of any unlawful assemblage at or near a labor dispute. In the trial court, the case had been tried as an offense under that provision of the Act, and the jury had been instructed under that provision of the Act. The State Supreme Court upheld the convictions, however, without considering the defendants' attacks on the constitutionality of that particular provision of the Act, by holding that the conviction could be sustained under another provision of the same Act, which prohibited the use of force or violence to prevent any person from engaging in any lawful vocation. The State Supreme Court reasoned that it could uphold the convictions on this basis because the information pursuant to which the defendants had been charged included an allegation that the defendants had used force or violence to prevent an individual from working. This Court reversed, holding that the affirmance of petitioners' convictions under a different provision from the one under which they had been charged violated the most fundamental principles of due process--the rights of an accused to be informed of the specific charge against him and to have the opportunity to be heard in a trial of the issues raised by that charge. At 333 U.S. 202, this Court stated:

> "...To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court."

Similar concerns caused this Court to reverse petitioners' convictions in Russell v. United States, supra, on the ground that the indictments that had been returned against the petitioners failed to apprise them with sufficient particularity of the charges against which they were required to defend. At 369 U.S. 766, this Court stated:

> "...A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. The Court has had occasion before now to condemn just such a practice in a quite different factual setting. Cole v. Arkansas, 333 U.S. 196, 201-202, 68 S.Ct. 514, 517, 92 L.Ed. 644." (Emphasis added).

The instant case is of the same kind. The court of appeals, by its affirmance, and the Ohio Supreme Court, by its refusal to hear the petitioner's appeal, excused the State's failure to prove a material allegation of the indictment, which the trial court identified to the jury as an essential element of the crime charged, by altering the charge brought against the petitioner after the verdict had already been returned. As Judge Jackson of the court of appeals noted in his dissenting opinion, "In circumstances such as these, where the State failed to give the accused proper notice of what it did ultimately

prove, and failed to prove what it gave the accused notice of,...Constitutional provisions of this state and the nation require reversal."[10] (See App. 45).

Moreover, as the petitioner argued in the court of appeals and in the Ohio Supreme Court, the prejudicial effect of the constitutional error committed by the lower courts was not confined merely to the Theft in Office charge; that error tainted the petitioner's conviction of Intimidation as well, because of the close connection between the two charges.

The petitioner's Intimidation conviction was based on a meeting which took place on August 2, 1975 (Tr. 114). During the course of that meeting, the petitioner allegedly asked Deputy Trainee Campbell to relinquish certain notes that Campbell had been keeping (Tr. 116). When Campbell refused to give up those notes, the petitioner allegedly threatened him (Tr. 119).

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[10] The affirmance of petitioner's conviction in this fashion also implicates Double Jeopardy concerns. In order to satisfy constitutional requirements, a charging instrument must be sufficiently definite to demonstrate with accuracy the extent to which an accused may plead a former acquittal or conviction in the event any proceedings are later instituted against the accused for a similar offense. Russell v. United States, supra. When an appellate court alters the elements of the charge after conviction, however, the original charging instrument no longer fulfills this constitutional mandate, and the accused may well be exposed to jeopardy again.

It was that threat which formed the basis of petitioner's conviction for Intimidation, and it was what Campbell's notes supposedly contained that prompted the petitioner to level that threat. The notes Campbell had been keeping concerned irregularities he had observed in Division 4, including the removal by petitioner from Division 4 of the two pearl-handled firearms on April 19, 1975 (See Tr. 187, 111, 117).

Thus, the close connection between the petitioner's conviction of Theft in Office and his conviction of Intimidation is apparent. The petitioner's alleged conduct in committing Theft in Office in Campbell's presence gave the petitioner a reason and motive for allegedly threatening Campbell when Campbell demonstrated an intention to use the notes he had allegedly made of the theft against the petitioner. Remove that reason and motive, however, and a different result would in all likelihood obtain with respect to the Intimidation charge.

As a consequence, any constitutional error committed by the courts below with respect to the Theft in Office charge was prejudicial to the petitioner on the Intimidation charge as well. At the very least, it cannot be concluded that such errors were harmless with respect to the Intimidation conviction beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

An important constitutional question which was probably wrongly decided by the lower courts is presented by this petition concerning the right of an accused not to have the charge brought against him altered after verdict by a state appellate court which is asked to review his conviction. The petitioner, therefore, urges this Court to review his two convictions on certiorari.

II.

An Important Question, Decided By The Lower Courts In A Way Probably Not In Accord With Applicable Decisions Of This Court, Is Presented Concerning The Constitutional Validity, Under the Sixth and Fourteenth Amendments, Of The Action Of A State Appellate Court In Affirming A Criminal Conviction On The Basis Of An Entirely Different Theory Of The Case From That Which The State Advanced In The Trial Court To Secure The Conviction.

Donald Campbell, the only witness who testified that the petitioner carried two pearl-handled firearms out of the fourth-floor office of Division 4, stated that the guns were in plastic bags when he observed them in Division 4 on April 19, 1975 (Tr. 29). He further testified that inside the bags along with the guns were tags which had markings on them (Tr. 29). Over defense objection, the following testimony was elicited from Campbell:

> "Q. Was there any address noted on the markings of the evidence bag?
>
> "A. 10001 Cedar Avenue." (Tr. 29).

This testimony was extremely vital, as it was by far the most important testimony in the entire case on the issue of whether or not the pearl-handled guns had been seized by the Sheriff's Department at the Cedar Avenue raid.

In his initial brief in the court of appeals, the petitioner argued that the admission of this hearsay testimony had been prejudicial error, requiring a reversal of his convictions. In that court, two of the three judges who sat on the panel which heard this case agreed that Campbell's testimony constituted inadmissible hearsay which should have been excluded by the trial court. Only Judge Jackson, who dissented, however, found the error to be prejudicial (See App. 45-54). Judge Corrigan, who cast the deciding vote, agreed, in his concurring opinion, that error had been committed, but concluded that it was harmless error (See App. 23-24). Judge Corrigan's finding of harmless error was based upon his determination that the error was not of constitutional dimension and upon his agreement with the opinion of the court that it had been unnecessary for the State to link the pearl-handled guns to the Cedar raid (See App. 24). In his application for reconsideration in the court of appeals and in his memorandum in support of jurisdiction in the Ohio Supreme Court, the petitioner noted that the State's entire theory of the case had always been that the guns the petitioner allegedly had pilfered were two pearl-handled guns seized at the Cedar raid. The petitioner argued that by affirming his conviction on the entirely new theory that the State had been under no obligation to connect the guns to the Cedar raid, the court of appeals had deprived him of his constitutional rights to be informed of the charge against him and to due process. (See App. 114-119, 99-105). The petitioner renews that argument here.

Until the court of appeals announced its initial decision in this case on February 28, 1978, the petitioner had every legitimate reason to believe that his convictions could be upheld only if there was sufficient competent evidence in the record to show that the State had fulfilled the promises it had made to the jury in its opening statement that it would prove the following facts in support of its theory of the case beyond a reasonable doubt:

* * *

"The evidence will show that at this time an alternate site for a raid was decided upon, and that being 10001 Cedar Avenue in the City of Cleveland. There was a -- no, there was not a search warrant for this particular address, but it was an alternate site for a raid on this particular occasion.

"The evidence will show that Major Payne, the defendant, and other employees of the Sheriff's Department did go out in the early morning hours of April 19th and did raid this establishment, and made several arrests and seized many items of evidence, such as gambling paraphernalia, money, liquor, and some weapons.

"The evidence will show, ladies and gentlemen, that seized at this particular address were six handguns and one shotgun, a long one.

"The evidence will further show, ladies and gentlemen, that the items that were seized from that address were brought back by the Sheriff's personnel to the property room area of Division 4, the fourth floor of County Jail, where it was to be inventoried and entered into the property room to be held pending any court case.

"The evidence will further reflect, ladies and gentlemen, that on this occasion in the early morning hours of April 19, 1975, the defendant in this case, Major Payne, requested of Detective Garner, who is an employee and along on the raid at the time, made a request for two 9-millimeter Browning firearms that had been seized at the raid on Cedar and were in the property room of Division 4 and as yet to be inventoried, and this request was made for these firearms for his own use.

"The evidence will further show that these two firearms were taken by Major Payne and he left the building with these two pistols.

"The evidence, ladies and gentlemen of the jury, will further reflect that the search warrant return that was filed and the inventory that was filed with the court and the property book

that is filed and kept as a matter of record by the Sheriff's Department indicate that on this particular night in question, at this particular raid, there are entries for four handguns and one shotgun.

"The evidence will further show, ladies and gentlemen, that there is no entry made for the two 9-millimeter pistols, the Browning firearms, either on the inventory that was filed as a result of this raid or they do not appear in the evidence book kept by the Sheriff's Department."

* * *

"We, the State of Ohio, have the burden of proof and we accept that burden."

* * *

"We will further prove to you beyond a reasonable doubt that on or about April 19, 1975, in the County of Cuyahoga, Major Edward Payne unlawfully and purposely, while being a public official, used his office in the aid of committing a theft offense; that he knowingly and purposely obtained for his own use two 9-millimeter firearms with pearl handles on same from property lawfully seized by and in the possession of the Cuyahoga County Sheriff's Department." (State's opening statement, Tr. 11-13; Tr. 19-20)(Emphasis added).

When the court of appeals rendered its decision, however, the petitioner was informed that he had been sadly mistaken. That court upheld his conviction based on its determination that it had been altogether unnecessary for the State to prove that the pearl-handled firearms had been seized at the Cedar raid. By ruling that it was wholly unnecessary for the State to prove that the guns had been seized at the Cedar raid, and by ruling that it was wholly unnecessary for the State to prove that the seizure of those guns had been lawful and, indeed, by effectively ruling that the State was not even required to prove that the guns had come into possession of the Sheriff's Department by means of a seizure at all, the court of appeals affirmed the petitioner's convictions on the basis of an entirely different theory of the case from that upon which the State relied in the trial court to secure the conviction.

Indeed, the issue of whether or not two pearl-handled guns had been seized at the Cedar raid was one of the most hotly contested issues in the entire trial. The State devoted a major part of its trial effort to an attempt to prove that two pearl-handled guns had been seized at Cedar. The major thrust of the defense at trial was that no pearl handled firearms had ever been seized at the Cedar raid, and that the pearl-handled guns were nothing more than the creation of a biased, bitter and uncorroborated Donald Campbell.

The petitioner submits that, in the face of such a record, the court of appeals' determination that it had been unnecessary for the State to prove to the jury its entire theory of the case and its affirmance of petitioner's convictions based

on an entirely new theory of the case, a theory of which the petitioner had never previously been apprised, deprived him of his constitutional rights to be informed of the specific charge against him and to due process of law. Just as the petitioners in Cole v. Arkansas, 333 U.S. 196 (1948), the petitioner here was entitled, as a matter of due process of law, "...to have the validity of [his] convictions apprised on consideration of the case as it was tried and as the issues were determined in the trial court." Id., at 333 U.S. 202. The petitioner had a constitutional right to be afforded notice of the charge against him in terms sufficiently inelastic to preclude his conviction from resting on one point while the affirmance of that conviction rested on another. Russell v. United States, 369 U.S. 749, 766 (1962).

The decisions of the lower appellate courts deprived the petitioner of those rights, however. As a result, not only is the petitioner's conviction of Theft in Office tainted by constitutional error, but the petitioner's closely connected conviction of Intimidation is so tainted as well. Accordingly, petitioner urges this Court to review this substantial constitutional question on certiorari.

III.

An Important Question, Decided By The Lower Courts In A Way Probably Not In Accord With Applicable Decisions Of This Court, Is Presented Concerning The Right Of An Accused, Under The Sixth And Fourteenth Amendments, To Confront The Witness Against Him.

As previously noted, two of the three judges who heard this case in the court of appeals agreed with the petitioner's

contention that Campbell's oral testimony that the address 10001 Cedar Ave. was written on the tags he observed in the plastic bags containing the pearl-handled guns should have been excluded by the trial court. The petitioner's conviction was, nevertheless, affirmed on the basis of concurring Judge Corrigan's conclusion that the error was harmless. This conclusion was based, in part, upon his determination that the erroneous admission of Campbell's hearsay testimony was not an error of constitutional proportion, a determination which permitted him to apply a less exacting standard of review in assessing the prejudicial effect of the admission of that testimony (See App. 24). In his application for reconsideration in the court of appeals and in his memorandum in support of jurisdiction in the Ohio Supreme Court, the petitioner argued that, under the circumstances of this case, the admission of Campbell's hearsay testimony was, indeed, error of constitutional dimension, in that it deprived the petitioner of his Sixth and Fourteenth Amendment right to confront the witnesses against him (See App. 111-114, 90-98.

At the core of the protection afforded by the Confrontation Clause of the Sixth Amendment, made applicable to the states by way of the Due Process Clause of the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400 (1965), is the guarantee that the accused will be afforded the opportunity to cross-examine the witnesses against him face to face in front of the jury chosen to pass upon his innocence or guilt. Barber v. Page, 390 U.S. 719 (1968); Bruton v. United States, 391 U.S. 123 (1968); Pointer v. Texas, supra. As this Court stated in California v. Green, 399 U.S. 149 at 161 (1970):

"...We note that none of our decisions interpreting the Confrontation Clause requires excluding the out-of-court statements of a witness who is available and testifying at trial. The concern of most of our cases has been focused on precisely the opposite situation - situations where statements have been admitted in the absence of the declarant and without any chance to cross-examine him at trial...." (Emphasis added).

In the instant case, Donald Campbell was permitted to testify, over objection, as to an out-of-court written statement, made by an unidentified declarant, to the effect that the pearl-handled firearms had come from the Cedar raid. Because the petitioner never had the opportunity to confront and cross-examine the author of that crucial out-of-court written statement, the trial court's error in allowing that hearsay testimony to be heard and considered by the jury was error of constitutional proportion under the Sixth and Fourteenth Amendments.

Because of the importance of linking the pearl-handled guns to the Cedar raid, see, supra, at 9-12, the admission of Campbell's oral testimony, in derogation of the Confrontation Clause, was extremely prejudicial with respect to the charge of Theft in Office. Furthermore, because of the previously noted close connection between the Theft in Office charge and the Intimidation charge, the error was prejudicial as to the Intimidation charge as well. See Chapman v. California, 386 U.S. 18 (1967).

Accordingly, this Court ought to review the petitioner's convictions because of the petitioner's serious constitutional claim under the Confrontation Clause which was rejected by the court of appeals and by the Ohio Supreme Court.

CONCLUSION

A careful reading of the thorough, cogent and persuasive dissenting opinion delivered by Judge Jackson of the court of appeals in this case (see App. 28-83) demonstrates clearly both the injustice suffered by petitioner in the lower courts and the substantiality of the constitutional questions presented by this petition. Accordingly, petitioner respectfully urges this Court to grant the writ of certiorari and accept this case for review.

Respectfully submitted,

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